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In the
Supreme Court of the United States.

No. 79-1979

OCTOBER TERM, 1979.

J. JOSEPH GARRAHY AND
BRADFORD E. SOUTHWORTH ET AL.,
PETITIONERS,

v.

NICHOLAS PALMIGIANO AND
LEONARD JEFFERSON ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners J. Joseph Garrahy, Bradford Southworth, and others respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on March 3, 1980.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions of the District Court for the District of Rhode Island, 466 F. Supp. 732 (D.R.I. 1979), also appear in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on March 3, 1980. Justice Brennan granted an extension of time until June 16, 1980 in which to file this petition without prejudice to the Court's consideration of whether the petition was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether the trial court should consider counsel's actual salary in determining a reasonable fee pursuant to 42 U.S.C. § 1988.

Statutory Provision Involved.

United States Code, Title 42, Section 1988, as amended, in relevant part provides:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or pro-

ceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Statement of the Case.

Nicholas Palmigiano and other prisoners and pre-trial detainees confined at the Adult Correctional Institutions brought this consolidated class action against the Governor of Rhode Island, J. Joseph Garrahy, and officials and employees of the Institutions challenging the conditions of their confinement. Plaintiffs were represented by the National Prison Project of the American Civil Liberties Foundation.[1]

After a lengthy trial, the District Court held that the evidence supported the conclusion that "the totality of conditions of confinement in Maximum and Medium do not provide the 'tolerable living environment' [citations omitted], that the Eighth and Fourteenth Amendments require for state prison inmates." *Palmigiano* v. *Garrahy*, 443 F. Supp. 956, 979 (D.R.I. 1977). In that opinion, the trial court also ordered the defendants to pay to plaintiffs' counsel reasonable attorneys fees pursuant to 42 U.S.C. § 1988. *Id.* at 990.

Following submission of memoranda on the fee issue by all parties the court conducted hearings on counsels' fee requests in December, 1978, and January, 1979. At those hearings, defendants indicated that plaintiffs' counsel were salaried and argued that the amount of that salary should be considered by

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[1] Plaintiffs were represented also by other counsel whose fee is not at issue.

the court in determining a reasonable fee for services performed on the pending matter. The court rejected defendants' position stating that nothing in the legislative history of 42 U.S.C. § 1988 or in the case law interpreting that statute supported the conclusion that salaried employees of a public interest firm should be treated in a manner different than a private practitioner. *Palmigiano* v. *Garrahy*, 466 F. Supp. 732, 736 (D.R.I. 1979).

Leonard Jefferson and other inmates at the Adult Correctional Institutions in a related action successfully prosecuted a class action against Bradford Southworth, then Director of the Department of Corrections, and other persons employed by the Department of Corrections in which they challenged the constitutionality of a lock-up instituted by officials at the Institutions. Plaintiffs in this case were also represented by counsel employed by The National Prison Project.[2]

Following plaintiffs' request for counsel fees pursuant to 42 U.S.C. § 1988, memoranda on the request were submitted by all parties. The litigants agreed that evidence presented at the December, 1978, and January, 1979, hearings on the fee request in *Palmigiano* v. *Garrahy*, would apply to the petition in this case. As in the *Palmigiano* case, the court rejected defendants' argument that the amount of counsels' salary should be considered in determining a reasonable fee for legal services performed during the pendency of the case.

On March 9, 1979, the District Court entered judgment in *Palmigiano* v. *Garrahy* awarding counsel fees in the amount of $65,549.40 to plaintiffs. On the same day, the court entered judgment in *Jefferson* v. *Southworth* awarding to plaintiffs counsel fees in the amount of $13,795.60. The defendants appealed this judgment to the United States Court of Appeals for the First Circuit. The Circuit Court upheld the award stating

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[2] Plaintiffs were also represented by other counsel whose fee is not at issue.

in short, that counsel salaried by public interest firms are to be treated for purposes of a fee award in the same manner as the private practitioner.

Reason for Granting the Writ.

I. The Decision Below is Contrary to the Intent of 42 U.S.C. § 1988.

Section 1988 of Title 42 provides that in any action to enforce a provision of 42 U.S.C. § 1983, the court "may allow the prevailing party a reasonable attorney's fee as part of the costs." The First Circuit has held that the touchstone of a reasonable fee is the market value of the services rendered without regard to the true value of those services as evidenced by the actual remuneration received by the attorney rendering service. (See Appendix p. 65a.)

The petitioners' concede that the view expressed by the First Circuit in *King* v. *Greenblatt*, 560 F. 2d 1024 (1st Cir. 1977) and *Lund* v. *Affleck*, 587 F. 2d 75 (1st Cir. 1978), and reaffirmed in the instant case, is consonant with the view adopted by other circuit courts addressing the ssue. *See, e.g.*, *Beazer* v. *New York City Transit Authority*, 558 F. 2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979); *Rodriguez* v. *Taylor*, 569 F. 2d 1231 (3rd Cir. 1977); *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.*, 517 F. 2d 1141 (4th Cir. 1975). However, petitioners assert that the legislative history of 42 U.S.C. § 1988 supports the position urged by petitioners.

Congress in enacting § 1988 clearly enunciated its purpose to encourage private citizens to vindicate the important congressional policies embodied in civil rights legislation. Section

1988 was directed towards the average citizen with few if any financial resources available to enforce his civil rights in a judicial proceeding. Senate Report No. 94-1011, 94th Congress, 2d Sess. 2 (1976). Congress noted that the fees awarded must be sufficient to attract competent counsel to assist plaintiffs who have suffered constitutional deprivations. Senate Report at 6. Congress cited with approval the standards relied on by the Fifth Circuit to establish a reasonable fee in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), specifically:

> "(1) *the time and labor required*. . . . (2) *the novelty and difficulty of the question presented*. . . . (3) *the skill required to perform the legal services*. . . . (4) *the preclusion of other employment by the attorney due to acceptance of the case*. . . . (5) *the customary fee in the community*. . . . (6) *whether the fee is fixed or contingent*. . . . (7) *time limitations imposed by client or circumstances*. . . . (8) *the amount involved and the results obtained*. . . . (9) *the experience, reputation and ability of the attorney*. . . . (10) *the undesirability of the case*. . . . (11) *the nature and length of the professional relationship with the client*. . . . (12) *the awards in similar cases*." *Id.* at 717-19.

The *Johnson* standards have been adopted with few changes by most circuit courts throughout the country. *See e.g.*, *King* v. *Greenblatt*, 560 F. 2d 1024 (1st Cir. 1977); *but see*, *Northcross* v. *Board of Education*, 611 F. 2d 624 (6th Cir. 1979).

Petitioners agree that the *Johnson* standards furnish an appropriate guideline to the court in attorney fee cases. But petitioners assert that in applying those standards in the instant case the trial court and the First Circuit, by refusing to con-

sider the actual salary of plaintiffs counsel as an additional factor in determining a reasonable counsel fee ignored the caveat stressed by the *Johnson* court which stated:

> To put these guidelines into perspective and as a caveat to their application, courts must remember that they do not have a mandate . . . to make the prevailing counsel rich. . . . The statute was not passed for the benefit of attorneys but to enable litigants to obtain competent counsel . . . and to fairly place the economical burden of . . . litigation. 488 F. 2d at 719.

This caveat makes it clear that the thrust of the Act is reimbursement not enrichment, that the intent is to allow citizens "to recover what it costs them to vindicate . . . rights in court," *Sargeant* v. *Sharp*, 579 F. 2d 645, 648 (1st Cir. 1978), not to create a windfall for counsel representing those citizens. *Id.* at 648. *See also Oliver* v. *Kalamazoo Board of Education*, 576 F. 2d 714 (6th Cir. 1978); *Planned Parenthood of Minnesota, Inc.* v. *Citizens For Community Action*, 558 F. 2d 861 (8th Cir. 1977); *Preston* v. *Mandeville*, 451 F. Supp. 617 (S.D. Ala. 1978); *Alsager* v. *District Court of Polk County*, 447 F. Supp. 572 (S.D. Iowa, 1977).

Petitioners do not assert that an award of fees to salaried counsel employed by public interest legal organizations in and of itself creates a windfall. Circuit courts have repeatedly affirmed the right of those organizations to an award of fees pursuant to § 1988. *See e.g., Lund* v. *Affleck*, 587 F. 2d 75 (1st Cir. 1978); *Beazer* v. *New York City Transit Authority*, 558 F. 2d 97 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568 (1979). However petitioners do assert that in light of the congressional intent the actual cost expended by that organization in counsel salaries in the pursuit of a favorable judgment should

be considered by the trial court as one factor in its assessment of the reasonableness of any fee request. The issue is not, as the First Circuit indicated, whether the losing defendant in a public interest case should gain an advantage by having fees computed differently for public interest firms (Appendix, p. 65a), but whether courts should consider the factual cost of litigation as indicated by the counsel salary expended as one factor in arriving at a fee award which fairly and reasonably reimburses a prevailing plaintiff's counsel for time expended in prosecuting the cause.

Petitioners assert that consideration of plaintiffs' counsel's actual salary as one factor in assessing a reasonable fee would not result in a windfall to defendants as the First Circuit indicated (Appendix, p. 69a). Rather it would assist the court to arrive at a rate of compensation which fairly reflects the real value of a particular counsel's services rather than the fair market value of services rendered by hypothetical counsel of certain experience and expertise. The value of counsel's services traditionally is reflected in the fees charged by that counsel or in salary paid to counsel by his employer.

Petitioners argue that the intent of § 1988 is to allow a successful civil rights plaintiff to shift the cost of securing his rights to the defendant (Senate Report at 2). The costs shifted should bear a relationship to the costs incurred — the counsel fee which plaintiff himself would have incurred. The actual fees regularly charged by particular counsel are evidence of the cost plaintiff would have incurred prior to enactment of § 1988. Where no fee is regularly charged, as in this case where counsel are salaried employees of a public interest organization, the amount of that salary is reliable evidence of the cost of the litigation.

The First Circuit stated in its opinion that counsel fees awarded to public interest organizations are expected to be used to finance more civil rights litigation (Appendix at

pp. 67a-68a). The petitioners note that the clear intent of § 1988 is reimbursement of the expense of litigation and urge that, by ignoring the reimbursement aspect of § 1988 in the instant case, the First Circuit in effect is requiring defendants in civil rights cases to finance litigation to which they are not a party and of which they have no knowledge or interest.

The importance of the reimbursement factor which petitioners raised to the First Circuit cannot be overemphasized. Petitioners assert that by failing to consider the actual cost of litigation in an award of fees, courts throughout the country are granting counsel fees against governmental entities which do not reflect the true cost of any given litigation and which, in the case of public interest organizations, is actually used to support litigation to which the governmental defendant is not a party.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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Appendix.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CIVIL ACTION No. 74-0172

NICHOLAS A. PALMIGIANO, ET AL.

v.

J. JOSEPH GARRAHY, ET AL.

CIVIL ACTION No. 75-0032

THOMAS R. ROSS, ET AL.

v.

J. JOSEPH GARRAHY, ET AL.

February 22, 1979.

Opinion

PETTINE, Chief Judge.

Plaintiffs' attorneys, employed by the National Prison Project of the American Civil Liberties Union, seek an award of fees in compensation for their successful presentation of a major civil rights class action, wherein the Court ordered the defendants to correct unconstitutional conditions then existing at the Adult Correctional Institution. The defendants raise

their objections to the granting of any award. One of these — that the Eleventh Amendment bans a fee award out of the state treasuries against state officials — can no longer be maintained. *Hutto* v. *Finney*, 46 U.S.L.W. 4817 (June 23, 1978) clearly sets aside any such state immunity. The other objections are that the requested hourly rates are excessive and unreasonable, and that the equities of the case require a reduction of the amount claimed.

The plaintiffs' right to recover a fee under the Civil Rights Attorneys' Fees Award Act of 1976, 42 U.S.C. § 1988, is so clearly established that any analysis or extended discussion of this point would be nothing more than an exercise of reiteration. On the other hand, the ultimate determination of the amount of the fee to be awarded requires a close filtering factual analysis of the case through the standards enunciated in *King* v. *Greenblatt*, 560 F.2d 1024 (1st Cir. 1977), and the teachings of *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978); and *Souza* v. *Southworth*, 564 F.2d 609 (1st Cir. 1978).

The consolidated class action giving rise to the present controversy was heard by this Court more than a year ago; after a lengthy trial an opinion was rendered on August 10, 1977, in which the Court found, among other things, that the

> lack of sanitation, lighting, heating and ventilation, and the noise, idleness, fear and violence, and the absence or inadequacy of programs of classification, education, physical exercise, vocational training or other constructive activity create a total environment where debilitation is inevitable, and which is unfit for human habitation and shocking to the conscience of a reasonably civilized person. *Palmigiano* v. *Garrahy*, 443 F.Supp. 956, 979 (D.R.I. 1977).

The case challenged virtually every aspect of prison life and required more than good legal competency to conduct and manage the pretrial discovery stage successfully and, in the courtroom, develop with probative evidentiary clarity the denouement of prison life at the ACI with all its inhumane unconstitutional aspects. It demanded advocacy at its best. It can be safely said the no case in this courtroom has ever generated more political and public reaction; more than a year later it is still of prime public concern and comment. The undesirability of the case is manifest in the reaction of a great majority of the people and as a consequence with many legislators.[1]

This complex legal and emotional setting is the common denominator for many of the criteria set forth in *King*, *supra*, each of which will be discussed; however, the final conclusion should be consonant with prior awards by this Court in similar cases, cited *supra*, as reviewed by the appellate court, to the end that an even-handed, logical body of precedents is established.

The right to a fee is firmly established in statutory law. In fact, the Court has already ordered, in its August 10, 1977 decision, that counsel for the plaintiffs be awarded reasonable attorneys' fees. Therefore, I will now consider the controlling criteria and the amount of the award.

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[1] This statement is based on the newspaper publication of the comments of various legislators and certain others of the general public. The long history of prisoner trials in this Court has given rise to more than a passing reaction in the past. The coercive nature of the Court's orders is not easily accepted by the legislative and executive branches of this government. At one point, it was reported that thirteen state senators joined in a resolution that Judge Pettine be impeached for issuing "unconstitutional" orders concerning the prison.

The Fee Award

In *King* v. *Greenblatt, supra*, the standards for computing a fee award under 42 U.S.C. § 1988 are:

> 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform the legal services; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. *Id.*, at 1026-27, describing *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

All these criteria will be considered though the defendants did state on the record that they do not question "the competency of Plaintiffs' counsel or the quality of their work", the number of hours for which compensation is sought.[2] (Defendant's memo p. 4.)

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[2] In oral argument the assistant attorney general representing the defendants stated that he did not question the actual hours the plaintiffs said "they put in on the case" because it "would be futile to go through cross-examination as to each particular hour. I do question duplicative hours; non-lawyer hours".

It was also stipulated that the Court could accept the affidavits, introduced as exhibits, as being the testimony the individuals would have given had they testified in person.

Time and labor required, novelty and difficulty of the questions presented; the skill required to perform the legal services; the experience, reputation and ability of the attorney.

These factors can best be realized by noting the comprehensiveness of the case which encompassed the totality of prison life in Rhode Island. The unconstitutional conditions attacked were the filth and deterioration of the maximum security building, its unsanitary, inadequate and dangerous plumbing and electric lighting, the intolerable noise level within the section, the inadequate heating and ventilating system — guards and inmates wore heavy coats day and night — the existing fire hazards, deplorable food service — presenting imminent danger to public health — health standards in the infirmary, collapse of the classification process, the rampant fear and violence throughout the prison, the intolerable idleness of inmates for lack of programs, the co-mingling of pretrial detainees and convicted felons, lack of drug abuse programs, deficiencies in medical services which were a threat to the lives of the inmates; in short, the plaintiffs developed their case in all these areas in an institution which, as stated by one expert, had "all the egregious deficiencies that could possibly exist" and as another expert testified was the only prison he ever visited for which he could find nothing good to say. In the August 10th Opinion this Court noted the enormous preparation and presentation required by this case: "After extensive discovery, a trial was held which extended over two weeks. The findings of fact required by Fed.R.Civ.P. 52 are set forth herein and are based on the testimony received at trial, stipulation by the parties and extensive exhibits, including depositions of various officers of the Department of Corrections. The Court's task was made easier by the extensive assistance of experts from various fields of corrections, institutional environmental health

and sanitation and correctional psychology". *Palmigiano, supra*, at 960.

It cannot be disputed the case involved a complex, complicated factual situation which required thorough pretrial discovery and study. Especially important was the familiarization with several specialized disciplines, so necessary for the proper presentation of expert testimony. Also required was the correlation and sifting of massive amounts of evidence and the ultimate orderly presentation in the courtroom. The novelty of the questions raised cannot be questioned; though there may be a legion of decisions on various aspects of prison conditions, at the time of this trial the Court could find no other decision covering the entire range of issues raised in this litigation.

The plaintiffs' attorneys are from the National Prison Project and have acquired a superior skill in this area of the law. It is uncontradicted they operate on a national scale and thus have represented prisoners in other states in many important cases involving complex constitutional issues. The recognition of their expertise is evidenced by their teaching, publications and appearances before Congressional Committees, various State Commissions and conferences on corrections.

Preclusion of other employment.

The defendants' argument on this issue is substantially the same as made in *Lund*. They claim this consideration is not relevant because the "National Prison Project is an arm of the privately-funded American Civil Liberties Union [and] its financial ability to maintain this type of lawsuit will not be impaired by a denial or limitations of fees" (defendants' brief). Defendants further contend the Court must take into consideration that the attorneys are salaried employees and thus no award should be made in excess of their salaries, *i.e.*, their entitlement must be nothing more than a percentage of their

salary as related to the time spent on this case. This argument concludes that "any amount over the cost incurred by the National Prison Project, the salaries paid out by the National Prison Project would amount to a windfall" (oral argument on briefs).

This argument was foreclosed by the First Circuit in *Reynolds* v. *Cooney*, 567 F.2d 1166 (1977) wherein it stated:

> Attorneys' fees are, of course, to be awarded to attorneys employed by a public interest firm or organization on the same basis as a private practitioner. *Id.* at 1167.

Accord, Perez v. *Rodriguez Bow*, 575 F.2d 21, 24 (1st Cir. 1978). In spite of this, the defendants press their position arguing that the appellate court has not answered the precise question — limitation of fees to public interest firms by the amount of their salaries. I fail in understanding their interpretation of the words, "on the same basis as a private practitioner." They do not argue that the public interest firms should be paid only the additional difference between their salaries and what a private practitioner would receive. Instead, they flatly state the plantiffs' attorneys should be limited by the ceiling of their salaries. In any event, the Court concludes that both positions are untenable. I find nothing in decisional law or the Congressional history indicating that the losing defendant in a public interest case should gain an advantage by having fees computed differently for public interest firms. Such an approach would surely negate the purpose of "deterring illegal conduct by the losing party and other possible violators" and is at odds with the "private enforcement pattern [existing] in numerous federal statutes mandat-

ing fee awards"; nor would it "induce behavior which courts and legislatures find desirable."[3]

The attorneys for the National Prison Project were precluded, because of the time occupied in the prosecution of this controversy, from applying their time on other important civil rights cases. Certainly the National Prison Project has budgetary strictures and the important services it offers have to be allocated as priorities demand. The award of attorneys' fees, all of which goes to the organization, is a means by which representation can be expanded to more litigants in civil rights cases.

The very purpose of the statute is to provide fees that are adequate "to attract competent counsel . . ." to the type of complex litigation produced by this case. Senate Report No. 94-1011, 94th Cong. 2d Sess. 1976 at 6; U.S. Code Cong. and Admin. News 1976, p. 5913. Neither the First Circuit nor any other circuit has ever included a collateral source doctrine in setting forth the controlling criteria in assessing a fee. *See, e.g., King* v. *Greenblatt, supra; Thompson* v. *Madison County Board of Education*, 496 F.2d 682, 689 (5th Cir. 1974); *Moore* v. *Townsend*, 525 F.2d 482-486 (7th Cir. 1975); *Brandersburger* v. *Thompson*, 494 F.2d 885, 889 (9th Cir. 1974); *Lea* v. *Cove Mills Corp.*, 438 F.2d 86, 88-90 (4th Cir. 1971). Finally, as the Fifth Circuit has stated,

> This Court has indicated on several occasions that allowable fees and expenses may not be reduced because appellants' attorneys was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee. . . . Whether the attorney charges a fee or has an agreement that the or-

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[3] *See*, Awards of Attorneys' Fees to Legal Aid Offices, 87 Harv.L.Rev. 411 (1973).

ganization that employs him will receive any awarded attorneys' fees are not bases on which to deny or limit attorneys' fees or expenses. *Fairly* v. *Patterson*, 493 F.2d 598, 606-7 (1971).

The Contingent Factor.

The only fee available in welfare litigation is pursuant to 42 U.S.C. § 1988 which, by its very terms, makes such fee contingent on the success of the litigation. Private attorneys have several options: Take the case on a purely contingency basis as provided in the statute and receive payment only if successful, arrange for compensation from the client if unsuccessful, or refuse the case. Only the first option is open to legal services attorneys. They are obligated to represent all the poor and reimbursement is completely contingent on success. *Lund* v. *Affleck*, 442 F.Supp. 1109, 1116. (D.R.I. 1977), *aff'd* 587 F.2d 75 (1st Cir. 1978).

The plaintiffs urge that since the individual plaintiffs were not obligated to pay any fees, the award should be adjusted upward as an "incentive" award because of the contingency factor. In support they cite *Parker* v. *Matthews*, 411 F.Supp. 1059, 1068 (D.D.C. 1976); *Lockheed Minority Solidarity Coalition* v. *Lockheed*, 406 F.Supp. 828, 834 (N.D.Cal. 1976); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 685-686 (N.D.Cal. 1974); and *Arenson* v. *Board of Trade*, 372 F.Supp. 1349, 1358 (N.D. Ill. 1974).

Certainly the contingency factor is cause for a more liberal application of the consideration guiding a court in awarding a fee; Congress intended, through the fees award act, to encourage civil rights litigation to vindicate important rights guaran-

teed by law. Further, the American Bar Association canon of ethics permits consideration of the contingent nature of the case when determining a fee. Therefore, a court should consider the contingent nature of a case if the statutory goal of full compensation is to be met. However, the contingency factor should not, as this Court sees it, be analogized to a punitive award.

Legal writers and a number of courts have alluded to the punitive nature of fee awards in these kinds of cases. Even conceding for the purpose of discussion that the coercion of a fee is in the nature of a punishment, the fee award, nevertheless, should not be thought of within the same framework as exemplary or punitive damages.[4] The fee must be measured by the uncertainty of success and be within the bounds of reasonableness. If the probability of success is a virtual certainty or great, it follows the contingent factor diminishes in value. The measure of this value is not subject to a standard formula; rather, it requires the most delicate application of judicial discretion, in order that the amount ultimately awarded is fair and ethical. *See* Berger, Court Awarded Attorneys' Fees: What is "Reasonable", 126 U.Pa. L. Rev. 281, 326 (1977).

One must remember that no single criterion can be considered in isolation. The statute contemplates reasonable fees. As the First Circuit stated, "[i]t is not enough for the court to multiply a fixed rate by the number of hours claimed. The court must satisfy itself of the overall fairness and reasonable-

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[4] This is not to say that awards in the nature of punishment may not be made in an appropriate case. Punitive and exemplary awards must require consideration of certain traditional factors such as malicious, wanton or oppressive conduct. *See*, such historic teachings as Hale, Damages §§ 87, 88 n.2 (2d ed. 1912); *International Union, United Auto., Aircraft* and *Agr. Implement Workers* v. *Russell*, 356 U.S. 634 (1958). I suppose a skilled advocate might persuasively argue that it should be no different in a civil rights case than in a tort action.

However, I take no position today as to the merits of the foregoing.

ness of the fee under all circumstances." *Lund* v. *Affleck*, *supra*, at 77. Reasonableness by its nature is an amorphous standard. Applying such a standard inevitably requires the application of subjective justice; but the contours of any subjective determination must be shaped by the particular objective facts of the case. Considerations of a reasonable fee should not include the bad faith, or obstinacy of the defendant; these elements might be considered separately in a possible award of punitive damages.[5] However, the standards set forth in *King* and *Johnson* are the ingredients to be weighed in the quest for what is just, and none of these standards warrant any punitive considerations.

The contingency factor may justify an upgrading; but this element must be applied with care and be directly related to the degree of the uncertainty of success; when added to the computed fee, the total amount must be reasonable and ethical. In our desire to vindicate public wrongs, we have not cast aside ethical considerations that hold adequate compensation is that amount which enables a lawyer to serve his client effectively and at the same time preserves the integrity and independence of the profession; that a lawyer should avoid charges which either overestimate or under-value his advice and service; and that a client's ability to pay is no reason for an excessive charge, though poverty may well require a lesser charge or none at all. American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106; The Canons of Professional Ethics of the Rhode Island Bar Association, Canon 12. An over-expansive interpretation of the fees award act can only do violence to the legal profession. It is neither romantic or emotional to say that surely part of the lawyers' reward must be in his realizations that in a public interest case he is cast in the role of representing a "great

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[5] *See*, n.4 *supra*.

deal more than his own interest", *National Association of Regional Medical Programs, Inc.* v. *Weinberger*, 396 F.Supp. 842 (D.D.C. 1975) — he acts in the nature of a private attorney general vindicating a congressional policy to eradicate a public evil. Though the contingent nature of the case in only one of the many considerations, it all too often is overemphasized to justify an unwarranted request by counsel.

Unfortunately, there does exist a wide discrepancy between fee awards in private antitrust cases (rates averaging $180 an hour) as against those in the area of civil rights (rates averaging $40 an hour) thus making private antitrust cases more attractive. *Berger, supra*, 126 U.Pa.L.Rev. at 310. However, this does not negate the fact that in public interest cases, all too often, it is the public that pays or an educational institution struggling against economic burdens that suffers. There is no question that the wrongdoer should be made to pay; but, on the other side of the coin, there is the overall public service that the defendant renders and this demands greater reserve in assessing an award. As *Johnson* teaches, "the customary fee in the community" must be considered; awarding such a customary rate, and a reasonable contingency amount when warranted, does not diminish attractiveness or discourage enforcement. The benefit of the class is served; a balanced and reasonable fee is not contrary to their interest and will not lose the attraction of competent attorneys. It is sophomoric to conclude that an attorney would not be interested in a $100,000 fee simply because application of a more liberal standard might pay him $200,000. In denying a large incentive "bonus" or "multiplier," this Court does not place a lower value on a civil rights fee award simply because the case serves a broader public purpose; rather, the Court intends to award full compensation for services rendered without designating an excessive fee or "bonus" that will injure the overall public interest served by the defendants. All these factors must be taken into consideration; the

traditional notion of ethics is still viable. Paying a full and fair fee does not mean enforcement of these civil rights statutes is dependent on the charity of competent counsel.

Not in any way minimizing the superior work and accomplishment of plaintiffs' counsel and in no way saying they have overemphasized the contingency element, the Court must conclude that the contingency factor cannot be given great value. The egregious conditions existing in the Rhode Island correctional system could hardly escape condemnation through a judicial declaration of unconstitutionality.

Customary fee in the community; amount involved and results obtained; awards in similar cases.

The plaintiffs' counsel urge this Court to consider the customary fee for similarly complex civil rights litigation done outside the State of Rhode Island as well as in Rhode Island. The defendants object claiming it is "without foundation", "contrary to the ruling in *King* v. *Greenblatt*, *supra*", that nothing "in *King* even hints at the idea that the complexity of the issues and the 'unusualness of the subject matter' . . . should expand to a national level the scope of the community."

The First Circuit in *King* cited with approval and accepted the criteria set forth in *Johnson*, where it is specifically stated that "[t]he reasonableness of a fee may also be considered in the light of awards made in similar litigation within and without the court's circuit", 488 F.2d at 719; it then reviewed cases from their own and other circuits in determining the appeal before them. Furthermore, the *Johnson* court also said that "[a]n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience." *Id.*

The customary fee in the Rhode Island community was established through the affidavits of three practitioners in this

state reciting their own billing rates for similar complex litigation. Mr. Ralph Gonnella recites that his billing rate for similar complex federal litigation is seventy-five ($75.00) dollars to one hundred ($100.00) dollars, "depending upon the complexity of the litigation and the nature of the issues"; Mr. Milton Stanzler, a member of the bar since 1948, states that in his opinion, "a reasonable fee for attorneys involved in complex federal litigation and civil rights litigation having experience of 25 years or more at the bar, would be the sum of $100. per hour"; without impugning their affidavits, the Court must interstitially note that both these attorneys have fee cases pending in this Court. Finally, Mr. Malcolm Farmer III sets forth that based on the hourly rates charged by attorneys in his firm, the "following fees are not inconsistent with the standard in Rhode Island: (I) for an attorney of five years' experience at the bar: $60.00 per hour; (II) for an attorney with seven years' experience at the bar: $70.00 per hour; and for an attorney with twenty-five years' experience at the bar: $85.00 per hour"; he further states that no distinction is made between the time spent in court as against time spent out of court and that, "it would not be inappropriate for a somewhat higher rate to be justified on the basis of the expertise of the attorney" in the area of litigation.

In other circuits we find the following: *Ruiz, et al.* v. *Estelle, et al.*, C.A. No. 5523 (E.D. Texas 1977), a prisoner civil rights case, awarding $75 an hour using the *Johnson* criteria; *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 684-85 (N.D. Cal. 1974), an action involving police misconduct, granting $50.00 an hour — the Court appears to have discounted the higher billing rates because the attorneys were not in their area of expertise and it should be noted that this is a 1974 case; *Guajardo* v. *Estelle*, C.A. No. 71-H-570 (S.D. Tex. 1977), a civil rights prisoner case, awarding lead counsel $115-$125 an hour, second counsel $70-80 an hour and third counsel, $50-60 an hour.

In the area of antitrust, awards have ranged from a low of $128.00 an hour to $500.00 per hour. *See Arenson* v. *Board of Trade*, 372 F.Supp. 1349 (N.D. Ill. 1974); *TWA* v. *Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970).

Focusing on prior awards in this Court and on those awarded by the First Circuit, we find that $60.00 per hour was awarded in a prisoner case for services performed in 1974 and $75.00 per hour thereafter, which included fee petition in the District Court. These amounts were upheld by the First Circuit, which reduced to $50.00 an hour the appellate work on the fee issue. *Souza* v. *Southworth*, 564 F.2d 609 (1st Cir. 1977). However, this bare recitation is misleading because the Court of Appeals did say that the award for the work before this Court was indeed very high and that had it not been for the fact that three appeals had been taken in the suit they would have been tempted to remand the case for reconsideration — it concluded, "The amounts though high cannot be considered unconscionable". In *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978), the Court sustained an award of $55.00 per hour and $60.00 per hour recognizing the erosion of the dollar over a five-year period. In *Save Our Sound Fisheries* v. *Callaway*, C.A. No. 5297 (D.R.I. March 6, 1978, unpublished), brought under the provisions of the Marine Protection, Research and Sanctuaries Act of 1972 and the Federal Water Pollution and Control Act of 1972, this Court awarded a fee of $75.00 per hour to one of the attorneys who had been before the bar twenty years and usually billed at that rate.

The awards in other circuits, set forth *supra*, are persuasive but certainly not controlling. In the last analysis the award in this case must be reasonably coextensive with awards made by the First Circuit in other similar cases; such a balancing is necessary for an equitable resolution of the problem at hand. In *Lund*, the appellate court approved an award of $60.00 an hour. It follows that it must be determined whether the case

at issue is more or less complex, etc. than *Lund*. In assessing *Lund* and its companion cases, decided in one opinion, this Court said at p. 1116,

> I find these cases had both novelty and difficulty requiring a high degree of skill for preparation and presentation which these attorneys satisfied to a very high degree. In *Palmieri*, careful legal and factual analysis of United States Supreme Court precedent was required to evaluate the State's position denying factual similarity of the instant case. The complexities involved in these kinds of cases demand the skill of a highly intelligent lawyer. To this Court's knowledge *Lund* was a case of national first impression. *Lund* involved questions of pendent jurisdiction of unconstitutional claims, 28 U.S.C. § 1343; need to reach constitutional challenge, 28 U.S.C. § 2281; class certification and interpretation of the Social Security Act; *Inmates of the Boys' Training School* involved enforcement of thirty-six page decree of detailed procedures to be followed by the defendants on behalf of a class of juveniles.

The same is true of this case; however, here there was a two-week trial involving a complex, complicated factual situation involving approximately 700 prisoners in several institutions. The Court quite agrees with the plaintiffs' counsel that it was particularly difficult to identify and prove the constitutional violations. A comprehensive factual record had to be placed before the Court which required testimony from seven nationally-known experts from six different disciplines. Here, unlike *Lund*, the tactical handling of the case needed more mature judgment and skilled advocacy. This was one of the first cases which attacked practically an entire prison operation affecting all inmates, pretrial and convicted; the end result was the pro-

mulgation of a sweeping order establishing minimum constitutional standards and implementing for the first time in Rhode Island a special master. The plaintiffs' attorneys needed the utmost skill to present, in a coordinated manner, complex facts. The case had the problems present in *Lund* and more. Striving to adhere to the teachings of our own circuit judges in light of what other circuits have said, I conclude that more than $60.00 per hour, as awarded in *Lund*, is justified here. Exercising my discretion, *King*, 560 F.2d at 1026, I conclude a fair award should be computed on the basis of the following hourly rates:

A) *MATTHEW L. MYERS* — Mr. Myers acted as lead counsel with the prime responsibility for the presentation of all the evidence. He seeks $70.00 an hour. It is true this amount represents a $10.00 per hour increase over the amount approved in *Lund*; it is also true, as already stated by the Court, that this case was more intricate and, unlike *Lund*, involved a lengthy trial requiring intensive preparation and trial presentation. Moreover, the Court is well aware that the effect of inflation during the past year and one-half makes a direct comparison between *Lund* and the present case illusory. Therefore, justice appears to dictate an increase over the rate awarded in *Lund*.

In the final analysis, the overall compensation awarded to each attorney must be fair and reasonable. With regard to Mr. Myers, the Court concludes that a rate of $75.00 for trial time and $70.00 out of court is entirely appropriate. I reject the defendants' argument that it should be less because at the time of the litigation Mr. Myers had only four years' experience. This is not persuasive — the number of years before the bar is not the touchstone that determines the worth of an attorney's fee. "[L]ongevity *per se*, should not dictate the higher fee. If a young attorney demonstrates that skill and ability, he should not be penalized for only recently being ad-

mitted to the bar"; furthermore, "[a]n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience". *Johnson, supra*, at 719. Mr. Myers is indeed an expert whose expertise and trial experience in many states of this country cannot be questioned.

Out-of-court time requires a lower fee. The First Circuit criticized the application of an across-the-board rate without regard "to the difficulty of the work, the results achieved, and all the other relevant factors", *King, supra*, at 1027-1028. This is a difficult issue. I agree that in this case the trial work demands the premium rate which may not be so in other cases, but how much less Mr. Myers should be paid for preparation, with all its demands on legal skills, should not be substantial. However skillfully it was tried, the secret was the intelligence used in developing and welding together all the facts into a cohesive pattern. It seems to me that $70.00 per hour for this work is reasonable and fair.

The Court notes that application of these rates gives rise to a reasonable increase over the rates awarded in *Lund*. Referring to the breakdown of Mr. Myers' hours which is set forth below, the average hourly compensation for his services in this case is $70.39. This 17 percent increase over *Lund* is accounted for by the greater complexity of this case and the 9 percent inflation rate[6] which had prevailed in our economy since the award in *Lund* was made.

B) *ALVIN BRONSTEIN* — Mr. Bronstein is the Executive Director of the National Prison Project of the American Civil Liberties Union Foundation. He has been a member of the bar for approximately 25 years and has vast experience in civil rights litigation; in addition, he is a teacher, lecturer, and writ-

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[6]Eckstein, O., "The New Reality", Data Resources Review, January, 1979, Vol. VIII, Number 1, p. 1.1.

er. His credentials are indeed impressive and it may be said he is one of the foremost national authorities in his field. He seeks $125.00 an hour for his services, which amount more than doubles the rates that have been previously approved in this circuit. Conceding all the qualifications Mr. Bronstein possesses, such a dramatic increase cannot be justified in the light of awards in other cases in this circuit and in the interest of overall fairness and reasonableness. The Court does feel, however, that Mr. Bronstein is deserving of a higher hourly rate than Mr. Myers.

Mr. Bronstein's greatest contribution to this case was in a supervisory capacity, where he could draw on the depth of his knowledge and rich experience to give to the preparation of the case the high gloss which was so evident to the Court in the presentation of a complex evidentiary record comprised of testimony on the various specialized fields of corrections, and in the legal arguments articulated so well in pre- and post-trial memorandum. In these endeavors his rate of compensation should be significantly higher than that allowed Mr. Myers. However, Mr. Bronstein's courtroom skill, though of the highest caliber in this Court's experience, was not integral to the successful presentation of plaintiffs' case in light of the commendable effort put forth by Mr. Myers, who acted as lead trial counsel while under the supervision of Mr. Bronstein. Therefore, the Court will set a lesser premium on Mr. Bronstein's in-court work as compared to that of Mr. Myers.

Taking the hourly rates allowed for Mr. Myers' work as a starting point and accounting for unique capabilities of Mr. Bronstein, the Court will allow compensation at the rate of $80.00 per hour in court and $75.00 out of court for Mr. Bronstein.

C) *EDWARD I. KOREN* — Mr. Koren is a staff attorney with the National Prison Project and seeks $75.00 an hour for his services. He was admitted to the District of Columbia bar

in 1969 and since that time has had a great breadth of experience in the civil rights area including litigation, directorships of various projects involving prisoners' rights issues, service with the Commission of Corrections for the State of New York and as a writer of several publications in this field.

It is difficult to understand why the plaintiffs' attorneys seek a higher hourly rate for Mr. Koren than they do for Mr. Myers. Mr. Myers acted as lead counsel in this case, while Mr. Koren's major contribution came from his out-of-court work. Despite Mr. Koren's superior experience, his compensation in this category should not exceed that of Mr. Myers. While he was present in court during the trial of this case, Mr. Koren did not actively participate in the presentation of plaintiffs' case. Therefore, I conclude that $70.00 per hour across the board is a fair rate for Mr. Koren's legal work.

However, it is incumbent upon this Court "to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." *King, supra*, at 1027. In the analysis of the affidavits, *infra*, this guide is considered. The task was not easy; the legal practice is not subject to a mathematical formula that can be scientifically applied. Mistakes are inevitable; bright line distinctions are not always possible.

As the Court has set forth below, certain of Mr. Koren's hours were spent examining ACI records in search of evidence of incidents of violence at the prison. While Mr. Koren's experience in prison matters may have enhanced his ability to perform this task, the work was essentially non-legal in nature and should be compensated at a rate of $30.00 per hour (see below).

D) *ROBERT MANN* — Mr. Mann served as local counsel and graduated law school in 1973. He has worked with the Rhode Island Legal Services, and since July, 1974 has been in private practice. He has been active in public interest and civil rights litigation, having acted as counsel in a number of cases in Rhode Island. His exposure and experience does not equal that of the other attorneys and his efforts appear to have been primarily that of an assistant. As the attorney for the litigants, he participated in the trial as a co-counsel but without any appreciable trial work as such, *i.e.*, interrogation and cross-examination of witnesses. This is not to say his court presence wasn't required — he did, indeed, represent the plaintiffs and the Court noted he was active throughout the trial in conferring with the prisoner plaintiffs who were in court and in numerous "counsel table" conferences with Mr. Myers. Here again, the Court feels no distinction can be drawn between in- and out-of-court time. A $60.00 hourly rate is fair and reasonable.

However, Mr. Mann also has sought compensation for work of an investigatory nature, such as checking records at a nearby fire station. For this work the Court will allow a fee of $30.00 per hour because it required neither legal skill nor specialized experience (see below).

In other instances Mr. Mann has sought compensation for more errand-running, such as picking up people at airports and obtaining copies of depositions. For these hours the Court will allow no compensation.

These hourly rates having been established, the Court scrutinized the affidavits of recorded hours to determine if there was a proper utilization of time or a duplication of effort; it further examined the plaintiffs' work to see if what was recorded was legal work in the strict sense or rather investigative, clerical, compilation of facts and statistics or other work which could have been accomplished by non-lawyers. The

Court also took into account the objections set forth by defendants to certain of the entries in plaintiffs' time sheets. Generally, defendants contended that certain hours billed by Messrs. Koren and Bronstein are duplicative and should be disallowed, while other hours billed by Mr. Koren involve work of a non-legal nature and therefore should be disallowed.

After a preliminary analysis of plaintiffs' affidavits and defendants' objections, the Court informed the parties of its concern over the amount of hours billed by plaintiffs' attorneys in several categories into which their work could be broken down. A supplemental hearing was held on January 26, 1979 to discuss these hours. Based on the record and the arguments presented at that hearing, the Court finds as follows with regard to these specific issues:

1) Conference Hours.

The plaintiffs' attorneys logged approximately 208 hours in conference, including time spent on the telephone and in communication by letter. The Court reviewed many specific entries of this type at its hearing of January 29 and now finds plaintiffs' entries to be justified. The attorneys approached the preparation and trial of this case in a systematic manner and divided labor among themselves in order to utilize efficiently their resources. In most instances, conferences were held for the coordination of these efforts or for the purpose of exchanging information learned by one attorney but important to another in his area of primary responsibility. In addition, conferences were held during the weeks prior to trial for the purpose of establishing schedules for the presentation of witnesses and contingency plans in the event that the trial's progress indicated that a change in the planned sequence was appropriate. The Court takes note that plaintiffs' evidentiary presentation was coherent and well organized despite its inclusions of expert testimony on every aspect of prison life. This attests to the value of such pre-trial conferences.

Additionally, conferences were held between Mr. Myers, as lead counsel, and Mr. Bronstein, as advisor. The Court accepts Mr. Myers' argument that such discussions were valuable to him and to the quality of plaintiffs' case as a means by which he could call on the superior experience and expertise of the Director of the National Prison Project.

For these reasons the Court will allow full compensation for the conference hours logged by plaintiffs' attorneys. In the context of litigation as complex as this, the Court will not penalize plaintiffs' attorneys for taking great care in the presentation of a truly commendable trial record, a record which, in turn, enhanced the accuracy of the Court's findings and the efficacy of the injunctive relief it eventually entered.

2) Hours Billed for Tours and Depositions.

In several instances Mr. Mann and another of plaintiffs' attorneys seeks compensation for their presence at a prison tour or witness deposition. Despite plaintiffs' argument that each attorney contributed to the conduct of the tour or deposition he attended, the Court will allow compensation for only one attorney on each of these occasions. In the computation of fees set forth below, the Court has equalized the burden of exclusion of these hours by deducting one-half of the excluded hours from the total allowed to the attending National Prison Project attorney and the remaining half from the total allowed to Mr. Mann.

3) Non-Legal Work.

The Court will allow compensation for hours spent in meetings and interviews with inmates because these hours may be viewed either as witness preparation or as attorney-client communication. However, the Court will apply a lesser rate to investigatory tasks such as records-checking, and it will allow no compensation for work which may be characterized as "errand running" (see below).

In accordance with the rates and hours allowed as described above, the Court hereby makes the following awards for each of plaintiffs' attorneys:

MATTHEW L. MYERS

Total Hours Requested				479.5
less duplicative hours in tours and depositions[A]				16.
Total Hours Allowed				463.5
in court	37 hrs.	@ $75.00/hr.	=	$ 2,775.00
out of court	426.5	@ $70.00/hr.	=	29,855.00
Total Award				$32,630.00

EDWARD I. KOREN

Total Hours Requested				228.
less duplicative hours in tours and depositions[B]				1.75
Total Hours Allowed				226.25
in court	29 hrs.	@ $70.00/hr.	=	$ 2,030.00
out of court	157.75 hrs.	@ $70.00/hr.	=	11,042.50
investigative	39.5 hrs.	@ $30.00/hr.	=	1,185.00
Total Award				$ 14,257.50

[A] This figure represents one-half of the time Mr. Myers spent on a tour or at a deposition with Mr. Mann.

[B] This figure represents one-half of the time Mr. Koren spent on a tour or deposition with Mr. Mann.

ALVIN T. BRONSTEIN

Total Hours Requested			142.5
Total Hours Allowed			142.5
in court	20 hrs. @ $80.00/hr.	=	$ 1,600.00
out of court	122.5 hrs. @ $75.00/hr.	=	9,187.50
Total Award			$ 10,787.50

ROBERT MANN

Total Hours Requested			515.5
less duplicative hours in tours and depositions[C]			17.25
less hours for non-legal work for which no compensation will be allowed[D]			6.75
Total Hours Allowed			491.5
in court	36.5 hrs. @ $60.00/hr.	=	$ 2,190.00
out of court	438 hrs. @ $60.00/hr.	=	26,280.00
investigative and other non-legal	17 hrs. @ $30.00/hr.	=	510.00
Total Award			$ 28,980.00

[C] This figure represents one-half of the time Mr. Mann spent on a tour or deposition with Mr. Mann or Mr. Koren.

[D] Hours billed for "errand-running".

The Court also will allow an award of costs and expenses, as requested by plaintiffs, in the amount of $352.39 for Mr. Mann and $7,874.40 for the National Prison Project. Thus, the total award to plaintiffs' attorneys may be computed as follows:

ROBERT MANN

fees	$ 28,980.00
expenses	352.29
	$ 29,332.29

NATIONAL PRISON PROJECT

Mr. Myers' fees	$ 32,630.00
Mr. Koren's fees	14,257.50
Mr. Bronstein's fees	10,787.50
costs and expenses	7,874.40
	$ 65,549.40

The Court is well aware that this award to the National Prison Project is more than $11,000 below the total fee requested by the A.C.L.U. attorneys. However, the Court is satisfied that the present award is just and reasonable in light of decisional law under the Attorney's Fees Act, the characteristics of this litigation, and the contributions of each attorney to the successful prosecution of this case.

An order will be prepared entering judgment for the plaintiffs in the amounts set forth above.

Chief Judge
February 22, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

NICHOLAS A. PALMIGIANO, ET AL.

v. C.A. No. 74-0172

J. JOSEPH GARRAHY, ET AL.

THOMAS R. ROSS, ET AL.

v. C.A. No. 75-0032

J. JOSEPH GARRAHY, ET AL.

March 13, 1979.

Order.

Pursuant to the findings of fact and conclusions of law set forth in the Opinion made and entered in this cause regarding attorneys' fees, it is the order, judgment, and decree of this Court that the defendants shall pay to the plaintiffs' attorneys the following sums forthwith:

ROBERT MANN

fees	$28,980.00
expenses	352.29
	$29,332.29

NATIONAL PRISON PROJECT

Mr. Myers' fees	$32,630.00
Mr. Koren's fees	14,257.50
Mr. Bronstein's fees	10,787.50
costs and expenses	7,874.40
	$65,549.40

Enter:

Per Order:

Chief Judge
3/9/79

Deputy Clerk

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

CIVIL ACTION No. 77-554

LEONARD JEFFERSON, ET AL.

v.

BRADFORD E. SOUTHWORTH, ET AL.

February 22, 1979.

Opinion

PETTINE, CHIEF JUDGE.

Attorneys for the plaintiffs in this case seek an award of costs and fees pursuant to the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988. Defendants have objected to the propriety of any award and, additionally, have raised specific objections to the rates and certain of the hours for which plaintiffs' attorneys seek compensation. Before ruling on the propriety or amount of any award, the Court will review briefly the history of this litigation.

History of the "Lockup" Case.

On August 10, 1977 this Court issued its Opinion and Order in *Palmigiano* v. *Garrahy*, 442 F.Supp. 956. In that Opinion the Court found that conditions at Rhode Island's Adult Correctional Institution were violative of the Eighth Amendment, and it ordered comprehensive changes in classification, pro-

gramming, health care, and physical facilities at the ACI. On August 26, 1977, within 16 days of the issuance of the *Palmigiano* Opinion, the Director of Rhode Island's Department of Corrections ordered a general lockup at the ACI's maximum security facility.

> This brought an abrupt halt to all activities for all of the inmates, numbering over four hundred, although only a couple were involved in the incident that the administration claimed constituted good cause for the lockup. There was a cessation of all vocational, educational and hobby programs; deprivation of visits and exercise; restricted access to attorneys who had to visit their clients at the cell doors and speak to them between bars. All meals were served in the prisoners' cells.
>
> *Jefferson* v. *Southworth*, 447 F.Supp. 179, 181 (D.R.I. 1978).

The lockup was triggered by an isolated incident involving only two inmates and a guard, *id.*, yet it continued in various forms for over five months. On September 2, 1977 plaintiffs filed their class action complaint in *Jefferson* v. *Southworth*, *supra*, challenging the constitutionality of the lockup pursuant to 42 U.S.C. § 1983. A series of hearings was held before the Court during September, November, and January, and in January the Court asked that the Special Master it had appointed in *Palmigiano* to report on the then-current status of the lockup. Finally, the Court issued an Opinion on February 3, 1978 in which it found that

> [t]he defendants, in the absence of an existing emergency, have locked the prisoners in their cells for approximately 22 hours a day; and although there has been a modifica-

> tion of this confinement, over fifty percent are still so confined on the day of this writing. Such isolation has exacerbated the uncontradicted, indeed admitted, inhumane living conditions set forth in *Palmigiano* v. *Garrahy*, 443 F.Supp. 956 (D.R.I. 1977) (*Palmigiano*). Even more devastating, the isolation has undermined the inmates' emotional capacity to cope with those inhumane conditions by depriving them of the aid, emotional support and social context, which they derived from contact with other inmates, their families and attorneys. This confinement has resulted in increased tensions, depression and a sense of hopelessness in the inmates. The deleterious effects, alone and in conjunction with the inhumane conditions existing before the lockup, are of such magnitude as to constitute a clear violation of the Eighth Amendment's proscription against cruel and unusual punishment.
>
> *Id.* at 181.

The Court recognized the difficulty of providing an adequate remedy in response to these findings because the program opportunities called for in the *Palmigiano* Order[1] had not yet been established.[2] Those opportunities were essential for relief of the pervasive idleness imposed on the inmates by the lockup.

> The Court therefore [took] the quite narrow step of ordering defendants to submit a plan within five days that

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[1] *See* paragraph 5 of the August 10, 1977 Order in *Palmigiano* v. *Garrahy*, 443 F. Supp. 956, 987-988 (D. R.I.).

[2] Paragraph 5 of that Order has yet to be implemented completely. *See Palmigiano* v. *Garrahy*, C.A. No. 77-142 [Special Master's] Final Recommendations to the Court on Compliance With Programming Requirements of August 10, 1977 Order (January 31, 1979).

[would] contain specific timetables and arrangements for the following:

1. Three meals per day in the dining room;
2. Visiting at the frequency permitted before the lockup began on August 26, 1977;
3. Consultation with counsellors in a private area other than the cell block if desired by the inmate;
4. Showers every other day;
5. Recreation for at least one hour per day;
6. School, industries, vocational training and work assignments for all sentenced inmates who wish to participate and who are not confined to the Behavioral Control Unit, to the maximum extent currently available and to the maximum extent these programs become available in the future.

The schedules for these activities should minimize the overlap of different activities to maximize the amount of time an inmate can spend outside his cell.

Jefferson v. *Southworth, supra*, at 191.

The Court also ordered reinstatement of the Morris Rules,[3] which had been suspended during the lockup.[4]

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[3] "Regulations Governing Disciplinary, Classification, and Mail Procedures for all Inmates at the Adult Correctional Institutions, State of Rhode Island," known as the Morris Rules, were promulgated in 1972 pursuant to a consent judgment entered by this Court in *Morris* v. *Travisono*, 310 F.Supp. 857 (1970).

[4] A subsequent injunction directing compliance with the Rules has been entered once before. *Morris* v. *Travisono*, 373 F.Supp. 177 (1974) and affirmed on appeal, 509 F.2d 1358 (1st Cir. 1975).

Defendants did not accept willingly the provisions of this order. They appealed[5] and simultaneously moved for modification and/or suspension of the remedial order during the pendency of appeal. Defendants did file several plans for gradually ending the lockup. Plaintiffs sought supplemental injunctive relief, moving to reopen the case on August 28, 1978 due to the institution of another lockup at the maximum security facility which was imposed after another incident there. After a hearing in October of 1978, the Court again sought the Special Master's assistance, this time directing him to work with attorneys for both sides in an attempt to negotiate a settlement. Ultimately, the issues raised by these supplemental proceedings were resolved without further court action.[6]

Plaintiffs' Motion for an Award of Costs and Fees

In its Opinion of February 3, 1977 the Court did not rule on the propriety of a fee award in this case. The state's threshold argument in opposition to plaintiff's request is founded on the Eleventh Amendment. The invalidity of this position was firmly established by the United States Supreme Court in its recent decision in *Hutto* v. *Finney*, ____ U.S. ____, 46 U.S.L.W. 4817 (June 23, 1978) and requires no further discussion here.

Apart from specific objections to the rates and hours for which plaintiffs' attorneys seek compensation, defendants submit that this Court should exercise its discretion under the Attorneys' Fees Awards Act and deny or sharply reduce the

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[5] The appeal was later dismissed by stipulation of the parties. *Jefferson* v. *Southworth*, No. 78-1113, Stipulation filed on June 7, 1978 (1st Cir.).

[6] The Special Master worked with defendants to produce an acceptable unlocking plan. The Court ordered implementation of this plan from the bench at a hearing on October 13, 1978.

amount of any award in this case. They argue that a substantial fee award would impair the ability of the state to finance the physical and administrative changes at the ACI which were ordered in *Palmigiano* v. *Garrahy*. Additionally, they point to the state's payment of the salary of the Special Master appointed in *Palmigiano* to monitor these changes as a burden which the Court should offset against a fee award in this case.

Defendants' position is both invalid and inappropriate. The costs of these physical improvements, administrative changes and the Special Master's monitorship are necessary incidents of the remedial decree entered in *Palmigiano*. It is axiomatic that the Court cannot accept defendants' lack of funds as an excuse for noncompliance with that order, *Holt* v. *Sarver*, 309 F.Supp. 362, 385 (E.D.Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1972). Nevertheless, defendants now attempt to relate this case to their compliance in *Palmigiano*, suggesting that compliance is contingent upon reduction or denial of an award here. Moreover, they imply that their willingness to comply will be diminished by an award in this case. They state that the "sincere and highly cooperative efforts of the Defendants to comply with this [*Palmigiano*] order will have been dealt a severe blow" by an award in *Jefferson*, and that "the spirit of cooperation between Defendants and this Court will be greatly enhanced by a ruling of this Court which denies or judiciously limits an award of attorneys' fees". Defendants' Memorandum in Support of Objection to Application for Attorneys' Fees, at 9.

These statements are disturbing; defendants must surely realize that the Court cannot and should not consider such factors in its ruling on the propriety of a fee award in this case. Their obligations to remedy constitutional violations at the ACI must remain the same.

This is not to say that the Court is unmindful of the financial burden an award in this case will impose on the state. How-

ever, defendants forget that an award of fees here is not a court-fashioned remedy but is directed by Congress. They confuse the Congressional intent and its mandate as to the proper manner in which the Court may exercise its discretion under the Attorneys' Fees Awards Act. In keeping with such legislative purpose, the Court will "satisfy itself of the overall fairness and reasonableness" of any fee it awards here. *Lund* v. *Affleck*, 587 F.2d 75, 77 (1st Cir. 1978). Defendants will be protected from the burden of an unreasonable award by this Court's careful application of the factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974) and approved in this circuit by *King* v. *Greenblatt*, 560 F.2d 1024 (1977). Those factors focus on the services performed by plaintiffs' attorneys and the characteristics of the litigation which gives rise to the fee application. It is not in keeping with the intent of the Act, which was to encourage enforcement of Civil Rights statutes, to reduce the amount of such an award, properly computed under it and the *Johnson* criteria, because defendants complain that their ability and/or willingness to comply with the *Palmigiano* order would be diminished.

Defendants also contend that the Court should consider that "plaintiffs' class caused the lockup to begin originally and exacerbated the situation by their actions and reactions within maximum security during the months of the lockup". Defendants' Memorandum at 9. While the conduct of plaintiffs may be considered, in the exercise of the Court's discretion, in the determination of the propriety of a fee, *Skehan* v. *Board of Trustees*, 436 F.Supp. 657 (N.D.Pa. 1977); *Castleberry* v. *Langford*, 428 F.Supp. 676 (N.D.Tex. 1977), defendants' position is inconsistent with the Court's factual findings in *Jefferson*. In its Opinion, the Court concluded that "[t]he defendants have arbitrarily and unnecessarily confined the majority of the inmates to their cells alone for between 21 and

22 hours a day under conditions, the totality of which violates the Eighth Amendment. . . ." *Id.* at 191. Defendants contended that the incident "cannot be viewed in isolation. Prior thereto, there had been a series of inmate assaults upon each other, a gun was discovered, and contraband flowed into the prison. . . . [T]his general situation threatened the security of Maximum and require the total confinement of the prisoners." *Id.* at 181. However, the Court recognized the "inconsistency of the State's position," noting that "[n]one of these acts had received any particular administrative reaction prior to August 26. Nor was there evidence that at the time the lockup was ordered, any of these prior acts were discussed or determinative of the ultimate action taken." *Id.* at 181, 182. Finally, it concluded that, "[c]onceding the inmates' disobedience, that fact alone does not justify a continued pattern of grinding authority, the ceaseless exercise of which will completely break these men." *Id.* at 190.

Thus the Court finds no basis in this case for a reduction or denial of a fee based on the acts of the plaintiffs. Defendants' fault was in their overreaction to incidents at the prison. Their imposition of unconstitutional conditions on the inmates during the lockup cannot be justified by reference to the incidents which triggered their overreaction, nor can a fee be denied to plaintiffs' attorneys on that basis.

Finally, defendants claim that an award may be limited or denied because plaintiffs' attorneys are employed by a privately funded public interest group. It is well settled that fee awards for such attorneys are to be computed on the same basis as awards made to private attorneys. *Lund* v. *Affleck*, 587 F.2d 75, 76 (1st Cir. 1978).

Because the plaintiffs were the prevailing parties in this litigation, and because none of defendants' objections may defeat the *propriety* of an award, the Court will award a reasonable fee pursuant to the Civil Rights Attorneys' Fees Awards Act.

The Fee Award.

In *King* v. *Greenblatt, supra*, the twelve factors set forth in *Johnson* v. *Georgia Highway Express, Inc., supra*, were adopted for use in determining the proper amount of fee awards in this circuit under the Attorneys' Fees Awards Act. The Court will consider each of these factors[7] as well as defendants' objections as they pertain to the fee award in this case.

The Time and Labor Required.

This case involved several hearings spread out over a five month period. Plaintiffs proved the non-existence of an emergency at the ACI by presenting testimony from correctional officers, inmates, and prison officials. They also proved the injury suffered by the plaintiff class as a result of the lockup, in part by presentation of expert testimony from a psychologist of national reputation.[8]

Plaintiffs' attorneys have presented time sheets indicating the number of hours they expended in the prosecution of this case. Defendants have objected to certain of these hours as duplicative or non-legal. The Court has taken those objections into account, mindful of its duty to consider "the possibility of duplication of effort along with proper utilization of time" and "to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers." *Id.* at 717.

Many of the hours to which defendants object involve conferences among plaintiffs' attorneys. The Court considered a

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[7] The Court has discussed the *Johnson* factors in detail in its attorneys' fees opinion in *Palmigiano* v. *Garrahy*, C.A. No. 74-172, Slip op. (February 22, 1979). Portions of that opinion are incorporated *infra* where relevant.

[8] Dr. Augustus F. Kinzel. Dr. Kinzel's qualifications are set forth in *Jefferson* v. *Southworth*, 447 F.Supp. 179, 183 n.3.

similar situation in its award of fees in *Palmigiano* v. *Garrahy*, C.A. No. 74-172, wherein plaintiffs' attorneys — the same attorneys who now apply for fees in *Jefferson* — sought compensation for more than 200 hours in conference, representing approximately 15 percent of their time on the case. The Court addressed specific questions to plaintiffs' attorneys on this point and thereafter concluded:

> The attorneys approached the preparation and trial of this case in a systematic manner and divided labor among themselves in order to utilize efficiently their resources. In most instances, conferences were held for the coordination of these efforts or for the purpose of exchanging information learned by one attorney but important to another in his area of primary responsibility. . . .
> Additionally, conferences were held between Mr. Myers, as lead counsel, and Mr. Bronstein, as advisor. The Court accepts Mr. Myers' argument that such discussions were valuable to him and to the quality of plaintiffs' case as a means by which he could call on the superior experience and expertise of the Director of the National Prison Project.
> *Id.*, Slip Op. at 26-27 (February 22, 1979).

The same justification applies in *Jefferson*. While attorney Mann served as local counsel, attorney Myers of the National Prison Project served as lead trial counsel. He and Mr. Bronstein contributed their superior experience in prison litigation to the successful presentation of this case, and coordination of their efforts with those of Mr. Mann was essential to the quality of representation afforded to the plaintiff class by these three attorneys. While the Court has scrutinized the record and time sheets for duplicative work, it will not penalize plain-

tiffs' attorneys for the time they took to consult with each other. Such "strategy sessions" are a necessary element in litigation of this type.

The Court will eliminate as duplicative hours spent by more than one attorney in attendance at depositions. In the computation of fees set forth below, the Court has equalized the burden of exclusion of these hours by deducting one-half of the excluded hours from the total allowed to the attending National Prison Project attorney and the remaining one-half from the total allowed to Mr. Mann.

The Court will eliminate from compensable hours the time spent by attorneys in travel. This consideration is applicable only in Mr. Mann's case, because Messrs. Myers and Bronstein have not sought compensation for travel time.[9] In response to an inquiry from the Court, Mr. Mann has identified 39.5 hours which may be eliminated from his time sheet as travel time.[10]

The Novelty and Difficulty of the Questions Presented.

The Court agrees with plaintiffs' attorneys that difficult factual questions were presented in this case. They overcame the contention of state officials that a state of emergency existed at the prison, a contention that was evaluated by the Court under a standard of review which gives great deference to the decisions of prison officials. *Jefferson*, *supra*, at 189. However, this issue is not a novel one. This Court has heard several suits in which attorneys for plaintiff inmates sought to prove the non-existence of an alleged emergency at the ACI. *Gomes* v. *Travisono*, 353 F.Supp. 457, *aff'd in part, rev'd in part*, 490 F.2d 1209 (1st Cir. 1973), vacated 418 U.S. 909, *cert.*

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[9] *See* Plaintiffs' Application for the Award of Reasonable Attorneys' Fees at 5.

[10] Letter to the Court of February 5, 1979.

denied, 418 U.S. 910, on remand 510 F.2d 537 (1st Cir. 1974); *Morris* v. *Travisono*, 373 F.Supp. 177 (1973), *aff'd*, 509 F.2d 1358 (1st Cir. 1974). In its opinion in *Jefferson* the Court compared this case with five others in which similar factual issues were decided. *Jefferson*, *supra*, at 189.

In one sense the issues presented by this case were novel, because the injury suffered by the plaintiff class was, in part, of a psychological nature. Plaintiffs' attorneys proved that such injury could be an element of an Eighth Amendment violation upon which the liability of prison officials was based.[11] The remedy granted by the Court, although limited to increased visitation, exercise periods, and other social activities, was designed to address the "devastating isolation of inmates that has continued for over five months" and thereby "at least address the specific harms" to which plaintiffs' psychological expert testified. *Jefferson*, *supra*, at 192.

Although this aspect of the *Jefferson* case was unusual, the Court will consider this element of the *Johnson* analysis, only

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[11] The lockup has engendered disorders the inmates did not have before; medically, Dr. Kinzel termed this "iatrogenic illness." Rehabilitation may be an illusive and rarely accomplished goal but at a minimum our penal institutions must not contribute to the grievous deterioration of the men placed in custody. *See Estelle* v. *Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Dr. Kinzel testified that the lockup caused tension, depression and hopelessness in the inmates to the point where they suffer hypochondriasis, attempt suicide, experience day-night reversal, develop hypersensitivity to noise because of the environment in which they are confined, withdrawal of interest, headaches and eye problems. It is, indeed, in this Court's opinion, inhumane treatment in the form of physical and psychological cruelty. The psychological impact of this oppressive caging of men in a dungeon-like atmosphere for over five months, in an attempt to subjugate the will of the inmates to the governance and discipline of the administration, is intolerable. Such "deliberate indifference to serious medical needs of prisoners" is cruel and unusual punishment, *Estelle* v. *Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976); *see Nadeau* v. *Helgemoe*, 561 F.2d at 420. *Jefferson* v. *Southworth*, 447 F.Supp. at 189-190.

in the entire context of the case, as a positive factor in the computation of the fee award here.

The Skill Required to Perform the Legal Services Properly

Plaintiffs' attorneys correctly point out that they were forced to prove many of the facts upon which their complaint was based — facts pertaining to the existence of an emergency and the circumstances surrounding the initiation of the lockup — by examination and cross-examination of adverse witnesses such as correctional officers and prison officials. This task required well-developed trial skills. In addition, the preparation and presentation of their expert psychologist's testimony required the same skills. As the Court already has noted, Messrs. Myers and Bronstein applied their extensive experience in prison litigation to the accomplishment of these tasks, and the Court will take this into consideration as a positive factor in the computation of their fees.

The Experience, Reputation, and Ability of Plaintiffs' Attorneys

Messrs. Myers and Bronstein of the National Prison Project "have acquired a superior skill in this area of the law. It is uncontradicted they operate on a national scale and thus have represented prisoners in other states in many important cases involving complex constitutional issues. The recognition of their expertise is evidenced by their teaching, publications and appearances before Congressional Committees, various State Commissions and conferences on corrections." *Palmigiano, supra*, at 6. Their affidavits attest to the breadth of their experience, and Mr. Bronstein may be characterized fairly as the foremost expert in prison litigation in the United States.

Robert Mann, who served as local counsel, graduated from Yale Law School in 1973. He has worked with Rhode Island Legal Services, and has been in private practice since 1974. He is active in public interest and civil rights litigation, having acted as counsel in a number of these cases in Rhode Island. However, his exposure and experience does not equal that of the other attorneys in this case.

The Preclusion of Other Employment.

Defendants claim that the ability of the National Prison Project to bring similar cases would not be impaired by a denial or limitation of fees because they are an arm of the privately-funded American Civil Liberties Union. The Court does not consider this argument to be accurate factually. The defendants made this argument before and it was laid to rest in *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978). The National Prison Project has paid plaintiffs' attorneys their salaries and subsidized the cost of this litigation without direct reimbursement from the plaintiffs. Their ability to carry on their public interest litigation can only be enhanced by an award of fees here.

Apart from the inaccuracy of defendants' contention, it is well settled that awards to public interest organizations should be made on the same basis as those made to private attorneys. *Reynolds* v. *Cooney*, 567 F.2d 1166 (1st Cir. 1977); *Lund*, *supra*.

Mr. Myers has requested compensation for 158.5 hours between November of 1977 and March of 1978. This represents roughly one quarter of his time, on the basis of a 40-hour week. Mr. Bronstein devoted only 30 hours over two and one-half months, roughly 8 percent of his time. Mr. Mann spent 350 hours over eight months, which represents about 27 percent of his time on a similar basis. While these proportions are

substantial for Messrs. Myers and Mann, neither attorney has indicated that the time he spent on this case seriously handicapped his ability to prosecute other pending cases or to take on new cases. The Court will not consider this an important factor in computing the fee.

The Contingency Factor.

Where an attorney takes the risk of no payment at all because his clients are not obliged to compensate him for his services, an award approved by the Court may be adjusted upward to compensate for this "contingency factor." *Parker* v. *Matthews*, 411 F.Supp. 1059, 1068 (D.D.C. 1976); *Lockheed Minority Solidarity Coalition* v. *Lockheed*, 406 F.Supp. 828, 834 (N.D.Cal. 1976); *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 685-686 (N.D.Cal. 1974); and *Arenson* v. *Board of Trade*, 372 F.Supp. 1349, 1358 (N.D. Ill. 1974).

> Certainly the contingency factor is cause for a more liberal application of the consideration guiding a court in awarding a fee; Congress intended, through the fees award act, to encourage civil rights litigation to vindicate important rights guaranteed by law. Further, the American Bar Association canon of ethics permits consideration of the contingent nature of the case when determining a fee. Therefore, a court should consider the contingent nature of a case if the statutory goal of full compensation is to be met. However, the contingency factor should not, as this Court sees it, be analogized to a punitive award.
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> Legal writers and a number of courts have alluded to the punitive nature of fee awards in these kinds of cases. Even conceding for the purpose of discussion that the coercion of a fee is in the nature of a punishment, the fee

award, nevertheless, should not be thought of within the same framework as exemplary or punitive damages. The fee must be measured by the uncertainty of success and be within the bounds of reasonableness. If the probability of success is a virtual certainty or great, it follows the contingent factor diminishes in value. The measure of this value is not subject to a standard formula; rather, it requires the most delicate application of judicial discretion, in order that the amount ultimately awarded is fair and ethical. *See Berger*, Court Awarded Attorneys' Fees: What is "Reasonable", 126 U.Pa. L. Rev. 281, 326 (1977).

One must remember that no single criterion can be considered in isolation. The statute contemplates reasonable fees. As the First Circuit stated, "[i]t is not enough for the court to multiply a fixed rate by the number of hours claimed. The court must satisfy itself of the overall fairness and reasonableness of the fee under all circumstances." *Lund* v. *Affleck*, *supra*, at 77. Reasonableness by its nature is an amorphous standard. Applying such a standard inevitably requires the application of subjective justice; but the contours of any subjective determination must be shaped by the particular objective facts of the case. Considerations of a reasonable fee should not include bad faith, or obstinacy of the defendant; these elements might be considered separately in a possible award of punitive damages. However, the standards set forth in *King* and *Johnson* are the ingredients to be weighed in the quest for what is just, and none of these standards warrant any punitive considerations.

The contingency factor may justify an upgrading; but this element must be applied with care and be directly related to the degree of the uncertainty of success; when added to the computed fee, the total amount must be rea-

sonable and ethical. In our desire to vindicate public wrongs, we have not cast aside ethical considerations that hold adequate compensation is that amount which enables a lawyer to serve his client effectively and at the same time preserves the integrity and independence of the profession; that a lawyer should avoid charges which either overestimate or under-value his advice and service; and that a client's ability to pay is no reason for an excessive charge, though poverty may well require a lesser charge or none at all. American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106; The Canons of Professional Ethics of the Rhode Island Bar Association, Canon 12. An overexpansive interpretation of the fees award act can only do violence to the legal profession. It is neither romantic or emotional to say that surely part of the lawyers' reward must be in his realizations that in a public interest case he is cast in the role of representing a "great deal more than his own interest", *National Association of Regional Medical Programs, Inc.* v. *Weinberger*, 396 F.Supp. 842 (D.D.C. 1975) — he acts in the nature of a private attorney general vindicating a congressional policy to eradicate a public evil. Though the contingent nature of the case is only one of the many considerations, it all too often is overemphasized to justify an unwarranted request by counsel.

Unfortunately, there does exist a wide discrepancy between fee awards in private antitrust cases (rates averaging $180 an hour) as against those in the area of civil rights (rates averaging $40 an hour) thus making private antitrust cases more attractive. *Berger, supra*, 126 U.Pa. L.Rev. at 310. However, this does not negate the fact that in public interest cases, all too often, it is the public that pays or an educational institution struggling against

economic burdens that suffers. There is no question that the wrongdoer should be made to pay; but, on the other side of the coin, there is the overall public service that the defendant renders and this demands greater reserve in assessing an award. As *Johnson* teaches, "the customary fee in the community" must be considered; awarding such a customary rate, and a reasonable contingency amount when warranted, does not diminish attractiveness or discourage enforcement. The benefit of the class is served; a balanced and reasonable fee is not contrary to their interest and will not lose the attraction of competent attorneys. It is sophomoric to conclude that an attorney would not be interested in a $100,000 fee simply because application of a more liberal standard might pay him $200,000. In denying a large incentive "bonus" or "multiplier," this Court does not place a lower value on a civil rights fee award simply because the case serves a broader public purpose; rather, the Court intends to award full compensation for services rendered without designating an excessive fee or "bonus" that will injure the overall public interest served by the defendants. All these factors must be taken into consideration; the traditional notion of ethics is still viable. Paying a full and fair fee does not mean enforcement of these civil rights statutes is dependent on the charity of competent counsel.

Palmigiano, supra, at 10-14 (footnotes omitted).

The Court will not increase plaintiffs' award on the basis of this factor. While plaintiffs were required to show that defendants' determination regarding the existence of an emergency was arbitrary, *Jefferson, supra*, at 189, the absence of justification for defendants' actions was never seriously in doubt once the suit was before this Court:

> In this case there is not even an open question as to whether an emergency exists. Associate Director Laurie flatly states there is none. Even if an emergency once existed sufficient to justify the initial lockup, a conclusion this Court has not and need not reach, those circumstances ceased long ago and cannot justify confinement extending for over five months. Any deference, properly accorded an administrative determination that an emergency situation justifies a general lockup, is not appropriate when, by the *administration's own admission*, the emergency no longer exists. *See Hoitt* v. *Vitek*, 497 F.2d 598, 600 (1st Cir. 1974).
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> *Jefferson, supra*, at 189 (emphasis added).

The testimony heard by the Court shed considerable light on the real reasons for the imposition of the lockup:

> The attitude that Director Southworth and Associate Director Laurie displayed in their testimony was that all signs of overt disobedience and willfulness [on the part of inmates] must be crushed before they would consider any letup in the lockup.
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> . . .
>
> The defendants . . . have attempted to solve their problem of poor administration and poor control over the prison guards and inmates by locking up the inmates. . . . Mr. Southworth's administrative solution imposes intolerable burdens on the prisoners.
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> *Jefferson, supra*, at 182-183.

Given this attitude on the part of the prison officials, the likelihood that plaintiffs would prevail before this Court was substantial. The Court will not increase the award of fees to

plaintiffs' attorneys based on this element of the *Johnson* analysis.

The Results Obtained.

Application of this *Johnson* factor to suits in which injunctive relief is obtained to remedy class-wide constitutional violations has been criticized as an arbitrary exercise.[12] However, *Johnson* does indicate that "the decision's effect on the law" should be taken into account in computation of a fee award. *Id.* at 718.

Here the injunctive relief granted to plaintiffs was narrow in scope, limited to the situation which prevailed at the ACI and defendants' ability to achieve an end to the lockup without program opportunities for inmates. Moreover, that injunction was not immediately effective; defendants required several months to produce an acceptable "unlocking" plan, and within five months a new lockup had been instituted which did not end until eight months after entry of the initial injunction. Because prison officials must be afforded wide discretion in maintaining the security of an institution, *Jefferson, supra*, at 189, a decree such as the one entered in this case can never have far reaching or lasting effect. In a subsequent "crisis" — alleged or real — prison officials will act with the goal of security in mind, and their decisions can be reviewed only after the fact.

In *Jefferson*, the Court specifically refrained from deciding that an emergency did not exist to justify the lockup. *Id.* at 189, but held only that continuation of the lockup for more than five months was an arbitrary act. *Id.* That decision's "effect on the law" is minimal.

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[12] *See Berger*, Court Awarded Attorneys' Fees: What Is "Reasonable", 126 U.Pa.L.Rev. 281, 316 (1977).

The Customary Fee Awards in Similar Cases.

In its opinion awarding attorneys' fees in *Palmigiano* v. *Garrahy*, the Court discussed the customary fee in this community and awards in similar cases. While *Jefferson* was not a comprehensive prison conditions suit, it is similar to the extent that it involved complex discovery in a prison setting and a trial which included presentation of experts and other witnesses. Plaintiffs' attorneys here are the same attorneys who were compensated in *Palmigiano*. They have filed affidavits from the same attorneys with regard to the proper hourly rate, and the state has put forth similar objections in both cases. Therefore, the Court's discussion in *Palmigiano* is particularly relevant here.

> The plaintiffs' counsel urge this Court to consider the customary fee for similarly complex civil rights litigation done outside the State of Rhode Island as well as in Rhode Island. The defendants object claiming it is "without foundation", "contrary to the ruling in *King* v. *Greenblatt, supra*", that nothing "in *King* even hints at the idea that the complexity of the issues and the 'unusualness of the subject matter' . . . should expand to a national level the scope of the community."
>
> The First Circuit in *King* cited with approval and accepted the criteria set forth in *Johnson*, where it is specifically stated that "[t]he reasonableness of a fee may also be considered in the light of awards made in similar litigation within and without the court's circuit", 488 F.2d at 719; it then reviewed cases from their own and other circuits in determining the appeal before them. Furthermore, the *Johnson* court also said that "[a]n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, providing his ability corresponds with his experience." *Id.*

The customary fee in the Rhode Island community was established through the affidavits of three practitioners in this state reciting their own billing rates for similar complex litigation. Mr. Ralph Gonnella recites that his billing rate for similar complex federal litigation is seventy-five ($75.00) dollars to one hundred ($100.00) dollars, "depending upon the complexity of the litigation and the nature of the issues"; Mr. Milton Stanzler, a member of the bar since 1948, states that in his opinion, "a reasonable fee for attorneys involved in complex federal litigation and civil rights litigation having experience of 25 years or more at the bar, would be the sum of $100. per hour"; without impugning their affidavits, the Court must interstitially note that both these attorneys have fee cases pending in this Court. Finally, Mr. Malcolm Farmer III [who did not file an affidavit in *Jefferson*] sets forth that based on the hourly rates charged by attorneys in his firm, the "following fees are not inconsistent with the standard in Rhode Island: (I) for an attorney of five years' experience at the bar: $60.00 per hour; (II) for an attorney with seven years' experience at the bar: $70.00 per hour; and for an attorney with twenty-five years' experience at the bar: $85.00 per hour"; he further states that no distinction is made between the time spent in court as against time spent out of court and that, "it would not be inappropriate for a somewhat higher rate to be justified on the basis of the expertise of the attorney" in the area of litigation.

In other circuits we find the following: *Ruiz, et al.* v. *Estelle, et al.*, C.A. No. 5523 (E.D. Texas 1977), a prisoner civil rights case, awarding $75 an hour using the *Johnson* criteria; *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 684-85 (N.D.Cal. 1974), an action involving police misconduct, granting $50.00 an hour — the Court appears to

have discounted the higher billing rates because the attorneys were not in their area of expertise and it should be noted that this is a 1974 case; *Guajardo* v. *Estelle*, C.A. No. 71-H-570 (S.D.Tex. 1977), a civil rights prisoner case, awarding lead counsel $115-125 an hour, second counsel $70-80 an hour and third counsel, $50-60 an hour. In the area of antitrust, awards have ranged from a low of $128.00 an hour to $500.00 per hour. *See Arenson* v. *Board of Trade*, 372 F.Supp. 1349 (N.D. Ill. 1974); *TWA* v. *Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970).

Focusing on prior awards in this Court and on those awarded by the First Circuit, we find that $60.00 per hour was awarded in a prisoner case for services performed in 1974 and $75.00 per hour thereafter, which included fee petition in the District Court. These amount were upheld by the First Circuit, which reduced to $50.00 an hour the appellate work on the fee issue. *Souza* v. *Southworth*, 564 F.2d 609 (1st Cir. 1977). However, this bare recitation is misleading because the Court of Appeals did say that the award for the work before this Court was indeed very high and that had it not been for the fact that three appeals had been taken in the suit they would have been tempted to remand the case for reconsideration — it concluded, "The amounts though high cannot be considered unconscionable". In *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978), the Court sustained an award of $55.00 per hour and $60.00 per hour recognizing the erosion of the dollar over a five-year period. In *Save Our Sound Fisheries* v. *Callaway*, C.A. No. 5297 (D.R.I. March 6, 1978 unpublished), brought under the provisions of the Marine Protection, Research and Sanctuaries Act of 1972 and the Federal Water Pollution and Control Act of 1972, this Court awarded a fee of $75.00 per hour to one

> of the attorneys who had been before the bar twenty years and usually billed at that rate.
>
> The awards in other circuits, set forth *supra*, are persuasive but certainly not controlling. In the last analysis the award in this case must be reasonably coextensive with awards made by the First Circuit in other similar cases; such a balancing is necessary for an equitable resolution of the problem at hand.
>
> *Palmigiano, supra*, at 16-18.

In *Lund* v. *Affleck*, 442 F.Supp. 1109 (1977), *aff'd*, 587 F.2d 75 (1st Cir. 1978), this Court awarded $60.00 per hour to plaintiffs' attorneys and noted that the case "had both novelty and difficulty requiring a high degree of skill for preparation and presentation which [the] attorneys satisfied to a very high degree." *Id.* at 1116. In *Palmigiano*, the Court felt compelled to go beyond the rates set in *Lund* because the former case was even more complex, involving a two week trial in which the Court heard testimony "from several nationally known experts from six different disciplines. Here [in *Palmigiano*], unlike *Lund*, the case needed more mature judgment and skilled advocacy. . . . The case had all the problems present in *Lund* and more." *Palmigiano, supra*, at 17-18.

The Court does not feel that the *Jefferson* case rises to the level of sophistication which was characteristic of *Palmigiano*. As the Court has noted, *Jefferson* did involve the novel and difficult issue of psychological injury due to prolonged isolation as an actionable Eighth Amendment violation. *See* 13, *supra*. The Court also has recognized that difficult factual issues were presented here regarding the alleged existence of an emergency justifying the lockup. Nevertheless, the case cannot be considered to be as difficult as *Palmigiano*, where the totality of conditions at the ACI was held to constitute an

Eighth Amendment violation based upon proof of facts and expert testimony pertaining to every aspect of prison life. Moreover, the remedial decree entered in *Palmigiano*, which plaintiffs helped to shape in their post-trial memorandum, was infinitely more comprehensive than that issued in *Jefferson*. In *Jefferson*, a major portion of the relief was left for the defendants' formulation; they were required to produce their own plan for ending the lockup within the constraints of a narrow Court order requiring increased showers, exercise, and visits. *Id.* at 191.

Jefferson must be compared more closely to *Lund* than to *Palmigiano*. While not adhering to the rate set in *Lund* as an absolute yardstick, the Court will not include in the hourly rate allowed here a premium for the complexity of the litigation such as that awarded in *Palmigiano*. The only significant difference, then, between the awards allowed in *Lund* and *Jefferson* can be based on the fact that the present award is made more than a year after *Lund*.[13]

With these comparisons in mind, the Court turns to the rates which will be applied to the services of each attorney:

A. *Matthew L. Myers*

Mr. Myers acted as lead counsel in *Jefferson*, with the prime responsibility for presentation of all evidence in Court at most of the hearings on the lockup. He seeks compensation at the rate of $70.00 per hour. This amount represents a $10.00 per hour increase over that awarded in *Lund*. However, the effect of inflation during the past year and one-half makes a direct comparison with *Lund* illusory.[14]

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[13] The rate of inflation during 1978 was more than 9 percent. *See* Eckstein, O., "The New Reality," Data Resources Review, January, 1979, Vol. VIII, Number 1, p.1.1.

[14] *See* n.13, *supra*.

In the final analysis, the overall compensation awarded to each attorney must be fair and reasonable. In light of the factors discussed above, I conclude that a rate of $65.00 per hour for trial time and $60.00 per hour out of court is appropriate and reasonable. The fact that Mr. Myers had only four years of experience when this litigation was initiated does not warrant reduction of this rate, because this factor alone is not compelling. "[L]ongevity, per se, should not dictate the higher fee. If a young attorney demonstrates . . . skill and ability, he should not be penalized for only recently being admitted to the bar." Moreover, "[a]n attorney specializing in civil rights cases may enjoy a higher rate for his expertise than others, provided his ability corresponds with his experience." *Johnson*, *supra*, at 719. Mr. Myers is, indeed, an expert in prison litigation whose trial experience in many states is indicated in his affidavit.

As this Court recognized in *Palmigiano*, out-of-court time requires a lower fee. The First Circuit criticized the application of an across-the-board rate without regard "to the difficulty of the work, the results achieved, and all the other relevant factors." *King*, *supra*, at 1027-1028. Nevertheless, it is clear in litigation of this type that the quality of trial presentation is entirely contingent on the trial attorney's ability to conduct efficient discovery and to prepare witnesses and himself for examination in Court. Thus the demands on an attorney's legal skills out of court are substantial in such a case, and it appears that a rate of $60.00 per hour for this work is appropriate with regard to Mr. Myers.

B. Alvin Bronstein

Mr. Bronstein has been an attorney for more than 25 years and has vast experience in civil rights litigation, lecturing, teaching and writing. As Director of the National Prison Proj-

ect, it may be said that he is one of the foremost authorities in his field. Conceding these qualifications, the Court cannot allow the $125.00 per hour rate Mr. Bronstein seeks for his services. Such a dramatic increase over the awards previously approved in this circuit cannot be justified in the interest of fairness and consistency.

Mr. Bronstein's greatest contribution here, as in *Palmigiano*, was that of supervisor and advisor. In conference with Mr. Myers, he contributed his superior knowledge and experience to enhance the preparation and presentation of this case. Mr. Bronstein's concededly superb courtroom skill was integral to plaintiffs' success in advising Mr. Myers who acted as lead counsel under Mr. Bronstein's supervision.

Taking the hourly rates allowed for Mr. Myer's work as a point of comparison, the Court will allow compensation for Mr. Bronstein at the rate of $70.00 per hour both in and out of Court.

C. Robert Mann

Mr. Mann served as local counsel in this case and in *Palmigiano*. He participated in most hearings as co-counsel, assisting Mr. Myers, although he did argue to the Court on a number of occasions. Here and in *Palmigiano* his major contribution to the case was in work with the plaintiff class. While the "attorney-client relationship" often may be strained in class action, civil rights litigation, Mr. Mann can be credited with preserving a valuable dialogue between these attorneys and the inmate plaintiffs.

The Court will allow a differential in Mr. Mann's compensation for in-court versus out-of-court time. Therefore, an award based on $60.00 per hour in court and $55.00 per hour out of court is fair and reasonable with regard to Mr. Mann's services.

In *Palmigiano*, the Court was able to make a distinction between Mr. Mann's legal services and work he performed which was of an investigatory nature, and merited a lesser hourly rate. *Palmigiano, supra* at 24. No such distinction can be drawn here. Therefore, with the exception of time included by Mr. Mann in his time sheet representing travel, the Court will allow full compensation for all out of court hours.

Based on the hourly rates set forth above, the Court will allow compensation for each of plaintiffs' attorneys as follows:

MATTHEW L. MYERS

Total Hours Claimed	158.5	
less duplicative hours in deposition[A]	2.5	
Total Hours Allowed	156	
in court -	27.5 hours at $65.00 per hour	= $1,787.50
out of court -	128.5 hours at $60.00 per hour	= 7,710.00
Total Fee Allowed		$9,497.50

[A] This figure represents one-half of the time Mr. Myers spent at a deposition with Mr. Mann.

ROBERT MANN

Total Hours Claimed	352.5	
less travel time[B]	39.5	
less duplicative hours[C] at depositions	2.5	
Total Hours Allowed	310.5	
in court - 30.75 hours at $60.00 per hour =		$ 1,845.00
out of court - 279.75 hours at $55.00 per hour =		15,386.25
Total Fee Allowed		$17,231.25

ALVIN J. BRONSTEIN

Total Hours Claimed	30	
Total Hours Allowed	30	
in court - 7 hours at $70.00 per hour =		$ 490.00
out of court - 23 hours at $70.00 per hour =		1,610.00
Total Fee Allowed		$2,100.00

[B] *See* discussion at n.10, *supra*.

[C] This figure represents one-half of the time Mr. Mann spent at a deposition with Mr. Myers.

In addition, the Court will allow an award of $126.26 in costs to Robert Mann; $2,198.10 in costs to the National Prison Project. These costs are not in dispute.

An order of judgment will be prepared accordingly.

Chief Judge
February 22, 1979

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

C.A. No. 77-554

LEONARD JEFFERSON, ET AL.

v.

BRADFORD E. SOUTHWORTH, ET AL.

March 9, 1979.

Order.

Pursuant to the findings of fact and conclusions of law set forth in the Opinion made and entered in this cause regarding attorneys' fees, it is the order, judgment, and decree of this Court that the defendants shall pay to the plaintiffs' attorneys the following sums forthwith:

ROBERT MANN

fees	$17,231.25
expenses	126.26
	$17,357.51

NATIONAL PRISON PROJECT

Mr. Myers' fees	$ 9,497.50
Mr. Bronstein's fees	2,100.00
expenses	2,198.10
	$13,795.60

Enter:

Per Order:

RAYMOND J. PETTINE
Chief Justice

Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CIVIL ACTION FILE NO. 77-0554

LEONARD JEFFERSON, ET AL.

v.

BRADFORD E. SOUTHWORTH, ET AL.

March 6, 1979.

Judgment

This action came on for trial (hearing) before the Court, Honorable Raymond J. Pettine, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that Judgment shall enter in accordance with the Opinion dated February 22, 1979.

Dated at Providence, Rhode Island, this 6th day of March, 1979.

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Clerk of Court

United States Court of Appeals

For the First Circuit

No. 79-1183.

NICHOLAS PALMIGIANO, ET AL.,

PLAINTIFFS, APPELLEES,

v.

J. JOSEPH GARRAHY, ET AL.,

DEFENDANTS, APPELLANTS.

No. 79-1185.

LEONARD JEFFERSON, ET AL.,

PLAINTIFFS, APPELLEES,

v.

BRADFORD E. SOUTHWORTH, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

Dennis J. Roberts II, Attorney General, and *Eileen G. Cooney*, Special Assistant Attorney General, on brief for appellants.

Matthew L. Myers, *Alvin J. Bronstein*, and *Robert Mann* on brief for appellees.

March 3, 1980

BOWNES, *Circuit Judge*. This is another round in the litigation about conditions at the Adult Correctional Institutions in Rhode Island. *See Palmigiano* v. *Garrahy*, 599 F.2d 17 (1st Cir. 1979). In this appeal the state defendants contest an award of attorney's fees totalling $115,483.75 made to the plaintiff prisoners under the Civil Rights Attorney's Fees Award Act of 1976 (the Fees Act), Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988).[1] The prisoners were represented by four lawyers: three were employed by the National Prison Project of the privately funded American Civil Liberties Union and the fourth, Robert Mann, was in private practice. The defendants accept the fee award as it relates to Mr. Mann's services. In addition, they concede that fees may be awarded for the services of attorneys employed by a public interest organization such as the National Prison Project, and that the district judge weighed each of the twelve factors we have said must be considered in making a fee award under the Fees Act. *See King* v. *Greenblatt*, 560 F.2d 1024, 1026-27 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). Nevertheless, the defendants contend that the district court erred in failing to consider the salaries of the National Prison Project lawyers in computing a reasonable fee.

The district court understood the defendants to be arguing that the award for these lawyers' services must be limited to

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[1] Two cases have been consolidated for appeal purposes. *Palmigiano* v. *Garrahy* was a successful class action challenging the overall conditions at the Rhode Island prisons as violative of the eighth amendment. 443 F.Supp. 956 (D.R.I. 1977). In that case the district judge awarded $86,655.00 in attorney's fees. 466 F. Supp. 732 (D.R.I. 1979). *Jefferson* v. *Southworth* was a successful challenge to a prolonged "lock-up" at the state's maximum security facility. 447 F. Supp. 179 (D.R.I. 1978). In that case attorney's fees of $28,828.75 were awarded. C.A. No. 77-544 (D.R.I., unpublished opinion filed February 22, 1979, and order entered March 9, 1979).

the actual cost to the National Prison Project in litigating the plaintiffs' lawsuits, as represented by the salaries paid counsel for the time spent on the cases.[2] In rejecting this argument, the district court considered itself bound by decisions of this court, particularly *Lund* v. *Affleck*, 587 F.2d 75 (1st Cir. 1978) and *Reynolds* v. *Coomey*, 567 F.2d 1166 (1st Cir. 1978), to compensate counsel on the same basis as private practitioners. *Palmigiano* v. *Garrahy*, 466 F. Supp. 732, 736 (D.R.I. 1979); *Jefferson* v. *Southworth*, C.A. No. 77-544, slip op. at 18 (D.R.I. February 22, 1979). In addition, it found no support in other case law or the legislative history of the Fees Act for computing fees differently for a public interest organization and thought that lesser compensation would undermine certain purposes of fee awards: to deter illegal conduct, to encourage private enforcement of civil rights laws, and to attract competent counsel. *Palmigiano* v. *Garrahy*, *supra*, 466 F. Supp. at 736. The court also noted that the National Prison Project was prevented by its work in the present cases from applying its resources to other civil rights litigation; it added that the fee award in these cases would help to finance other such lawsuits. *Id.*

Because the district court relied substantially on first circuit cases in refusing to give weight to counsels' salaries, we begin by reviewing our own precedent. In *King* v. *Greenblatt*, *supra*, 560 F.2d at 1026-28, we announced that we would re-

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[2] At a hearing about attorney's fees in *Palmigiano* v. *Garrahy*, the state defendants argued to the district court that "it would be improper . . . to award these attorneys [the salaried employees of the National Prison Project] an amount in excess of their salary as computed and reflected in percentage of time spent on this case[.]" On appeal, the state defendants' position is somewhat unclear, but appears to be that the actual cost of the litigation, as indicated by counsels' salaries, is *one factor* that should have been considered by the district court. Ordinarily a party may not shift his position on appeal; if there has been a shift in this case, it is immaterial to the outcome of the appeal.

quire courts awarding fees under the Fees Act to consider the twelve factors listed in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)[3] and affirmed a fee award to private counsel that seemed reasonable under the *Johnson* criteria. A lawyer's salary was not among the twelve criteria cited. To the contrary, the *Johnson* test focussed largely on the reasonable market value of the services rendered.

In *Reynolds* v. *Coomey, supra*, we were faced with an appeal from the denial of attorney's fees for the services of NAACP Legal Defense Fund staff attorneys. Reversing, we stated: "Attorney's fees are, of course, to be awarded to attorneys employed by a public interest firm or organization on the same basis as to a private practitioner." 567 F.2d at 1167. We instructed the district court to determine reasonable attorney's fees in the light of *King* v. *Greenblatt*. *Id.*[4] Likewise, in *Perez* v. *Rodriguez Bou*, 575 F.2d 21, 24 (1st Cir. 1978), we remanded for an award of attorney's fees for representation by the publicly funded Puerto Rico Legal Services, Inc., citing the above quoted language from *Reynolds* v. *Coomey*. *See also Perez* v. *University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979), remanding the case a second time for a fee award consistent with *King* v. *Greenblatt*.

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[3] The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the question presented; (3) the skill required to perform the legal services; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases.

[4] Although *Reynolds* was a Title VII case, we treated the fee request the same as we would a request under the Fees Act.

The next case involving a fee award to a legal services organization was *Lund* v. *Affleck*, *supra*. In that case, unlike *Reynolds* and *Perez*, the district court had awarded fees, which as here were assessed against Rhode Island officials. Although it is not altogether clear from our opinion, the Rhode Island defendants argued on appeal both that legal services organizations may not recover attorney's fees and, in the alternative, that recovery should be limited to their costs. 587 F.2d at 76; Brief for Defendants at 20-21, 25. We consider the first argument foreclosed by our recent decision in *Perez*, and upheld awards that had been made in accordance with *King* v. *Greenblatt*, with reference to billing rates of $55 and $60/ hour. *Id.* at 76-78.

A review of these cases demonstrates that we have previously held that public interest organizations (whether privately or publicly funded) be awarded attorney's fees under the Fees Act on the same basis as private practitioners. In *Lund*, especially, we were not impressed with the argument that attorney's fees to a legal services organization should be limited to the organization's costs. In this case the defendants would have us take a new approach. We decline to do so, and take this opportunity to explain why we adhere to our previously stated views.

First and foremost, we think that compensating public interest lawyers the same way as private practitioners is consistent with the legislative history of the Fees Act. The Senate Judiciary Committee Report, which states that fees are to be awarded according to the standards in *Johnson* v. *Georgia Highway Express, Inc.*, draws no distinction between employees of public interest organizations and members of the private bar. S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913. Indeed, the Senate Report cites with approval *Davis* v. *County of Los Angeles*, 8 EPD ¶ 9444 (C.D. Cal. 1974), a Title VII case in

which the court said, in determining the amount of attorney's fees to award:

> [I]t is not legally relevant that plaintiffs' counsel . . . are employed by the Center for Law in the Public Interest, a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner . . .

Id. at ¶¶ 9444-45. The court made its award by calculating reasonable hourly rates and referring to the factors mentioned in *Johnson* v. *Georgia Highway Express, Inc. Id. See also Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483, 486 (W.D.N.C. 1975), also cited in the Senate Report. Likewise, the House Judiciary Committee Report, H.R. No. 1558, 94th Cong., 2d Sess. 8 n.16 (1976), cites civil rights cases squarely holding that fee awards may not be reduced because the prevailing party's attorney is employed by a civil rights or tax exempt organization. *Torres* v. *Sachs*, 538 F.2d 10, 13 (2d Cir. 1976) (award for services of Puerto Rico Legal Defense and Education Fund upheld); *Fairley* v. *Patterson*, 493 F.2d 598, 606-07 (5th Cir. 1974) (award to Lawyers Committee for Civil Rights Under Law reversed as too small).

Furthermore, we think that allowing full compensation for the services of public interest lawyers serves the clearly expressed legislative purpose of encouraging private enforcement of civil rights laws. S. Rep. No. 1011, *supra*, at 5; H.R. Rep. No. 1558, *supra*, at 2. As the district court pointed out, the National Prison Project, like other such organizations, has

finite resources, and a full fee award will enable it to undertake further civil rights litigation.[5]

Second, we note that other courts have recently and convincingly rejected the notion that fee awards under the Fees Act (42 U.S.C. § 1988) or comparable statutes should be reduced or keyed to an attorney's salary when a prevailing party has been represented by a public interest organization. In *Rodriguez* v. *Taylor*, 569 F.2d 1231, 1247-48 (3rd Cir. 1977), *cert denied*, 436 U.S. 913 (1978), an ADEA case, the third circuit discussed this issue at length and concluded that the district court had abused its discretion in considering the salaries of legal services lawyers in setting fees. Other cases refusing to set fees in accordance with salaries are *Lackey* v. *Bowling*, 476 F. Supp. 1111, 1116-17 (N.D. Ill. 1979) (award to legal services organization under § 1988) and *Gunther* v. *Iowa State Men's Reformatory*, 466 F. Supp. 367, 368-69 (N.D. Iowa 1979) (award to Iowa Civil Liberties Union in Title VII case). *See also Beazer* v. *New York City Transit Authority*, 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grds.*, 440 U.S. 568 (1979) (award under § 1988 should be calculated

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[5] The district court so observed in the course of addressing the fourth *King* v. *Greenblatt* factor: preclusion of other employment. *Palmigiano* v. *Garrahy*, 466 F. Supp. 732, 736 (D.R.I. 1979). We cannot tell whether the district court merely refused to reduce the fees in part because they would help finance more litigation or whether the district court actually enhanced the award because the instant case precluded the National Prison Project from doing other work. We think it would have been inappropriate to apply the "preclusion" factor to enhance the award in a case like this, where counsel were not working for profit. *See Lamphere* v. *Brown University*, 610 F.2d 46, 47 (1st Cir. 1979) (the "preclusion" factor only applies when counsel had to forego more profitable opportunities). But, because we cannot be sure this was done and the defendants have made nothing of this issue on appeal, we see no need to disturb the award on this account.

without regard to non-profit or public interest nature of the work).[6]

Third, we are not convinced by the defendants' suggestion that setting fees in this case without regard to the salaries paid by the National Prison Project results in an impermissible windfall to the organization. Of course, concern is expressed in the legislative history and in the case law that counsel not be unjustly enriched. *E.g.*, S. Rep. No. 1011, *supra*, at 6; *Sargeant* v. *Sharp*, 579 F.2d 645, 648 (1st Cir. 1978). We do not think, however, that compensating a public interest organization like the National Prison Project on the same basis as a private practitioner results in such a windfall, particularly when fees are expected to be used to finance more civil rights litigation. Indeed, we are concerned that compensation at a lesser rate would result in a windfall to the defendants. *See id.* at 649.

Finally, the panel decision in *Copeland* v. *Marshall*, 594 F.2d 244 (D.C. Cir. 1978), does not persuade us to revamp our entire approach to attorney's fees. In that case, the court advocated a cost plus reasonable profit approach to calculating attorney's fees in a Title VII case where the federal government was the defendant. We are not at this point convinced that this approach would yield a fairer calculation of attorney's fees in a case like *Copeland*, and, for reasons stated above, we do not think a cost or salary related approach to computing attorney's fees in a case like this would be legitimate. We note, in any event, that the panel decision in *Cope-*

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[6] The only cases we have found that hold to the contrary are *Page* v. *Preisser*, 468 F. Supp. 399 (S.D. Iowa 1979) and *Alsager* v. *District Court of Polk County, Iowa*, 447 F. Supp. 572 (S.D. Iowa 1977), decided by the same judge. These cases stand for the proposition that § 1988 awards to organizations whose employees are salaried should generally be limited to salaries plus other costs (such as overhead), at least where the result would not be to undermine the deterrent or inducement to settle effects of fee awards, or to undervalue the services rendered.

land has been vacated, that the case has been reheard *en banc*, and that a decision is still forthcoming. *See* 48 U.S.L.W. 2017-18 (D.C. Cir. July 10, 1979).

Judgment affirmed.